No. 80-960

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STEVEN F. MATSCHKE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, in a probation revocation hearing, the trial court's actions denying Petitioner the opportunity to make a motion to suppress physical evidence prior to the hearing, and the opportunity during the hearing to cross-examine the arresting officer in order to determine whether he knew Petitioner to be a probationer at the time of the seizure violated Petitioner's right to Due Process.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS*

The Respondent, People of the State of Illinois, respectfully requests that the Petition for Writ of Certiorari to review the judgment and opinion of the Appellate Court of Illinois, Fourth District, entered on May 7, 1980, be denied.

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* The record is actually lodged in the Appellate Court of Illinois, Fourth District.

I.

STATEMENT OF THE CASE

On January 19, 1976, Petitioner Steven F. Matschke entered a plea of guilty to the charge of unlawful delivery of a substance represented as a controlled substance, in violation of Illinois Revised Statutes, 1973, Chapter 56½, Section 1404. This being a Class 3 felony. He was sentenced to a four year term of probation and ordered to pay a fine of $1,000.00 and costs. (C. 43-45)

On January 18, 1979, the People filed a Petition to Revoke Probation charging the Petitioner with six (6) violations of his probation. (C. 52-53, para. 4, 5, 6, 8, 10 and 12) At the May 11, 1979 hearing on the Petition to Revoke Probation the Petitioner stipulated to the violations set out in paragraphs 8, 10 and 12 of the petition. (R. PR 132-133) Paragraphs 4, 5 and 6 which alleged possession of two controlled substances and driving with a suspended license were contested at the probation revocation hearing. After all evidence was heard and arguments made the court entered a general finding that the People had proven by a preponderance of the evidence the allegations contained in the petition. (R. PR 138)

Immediately before the start of the probation revocation hearing Petitioner requested the trial court to allow him to adopt a motion to suppress physical evidence which he had previously filed in the substantive case charging drug possession. (R. PR 13) In that case the motion had been denied without a hearing because defense counsel had failed to appear when the motion was called for hearing. (R. PR 14) The record of the probation revocation hearing shows that defense counsel's request to file, or to adopt, a motion to suppress evidence was denied there solely and specifically because it was not timely filed.

> THE COURT: Well, again because of the untimeliness of it I'm going to deny the motion to even transport a motion

to suppress from cause number 78-CF-1382 into this case. So we'll proceed on the petition to revoke probation in 75-X-1264. Mr. Lipton. (R. PR 15)

Just before the above ruling by the court, the Assistant State's Attorney had suggested that if the court did grant the motion to adopt the motion to suppress evidence into the probation case, the court should deny that motion based on *People* v. *Dowery,* 62 Ill. 2d 200, 340 N. E. 2d 529 (1975). However, as the court did not allow the motion to be adopted the court never addressed itself to *Dowery.*

At the revocation hearing no evidence was presented for the Petitioner, therefore, the following evidence adduced by the People was uncontradicted. Officer Doty, while on routine patrol in a marked squad car, stopped Petitioner's car for speeding and failure to signal a turn. (R. PR 17) After a driver's license check which showed Petitioner's license suspended Officer Doty placed Petitioner under arrest. (R. PR 19-20) Petitioner pointed to a shaving kit and flight bag in the passenger compartment of his car, he told Doty he had money for a bond in those bags and requested the officer to retrieve them. (R. PR 20-21)

On arrival at the sheriff's office the jailer started processing the prisoner and Officer Doty searched the shaving kit and flight bag. Petitioner at that time objected to the search of the two bags. (R. PR 21-22) The controlled substances were found in the flight bag. (R. PR 23-24)

On cross-examination Officer Doty stated that in most instances of a stop for a traffic violation he runs a driver's license check, and that he did not place Petitioner under arrest until the check revealed a suspended license. (R. PR 40) Doty reiterated that Petitioner had requested him to take the luggage from Petitioner's automobile. (R. PR 41)

II.

REASONS FOR DENYING THE WRIT

THE TRIAL COURT DID NOT VIOLATE PETITIONER'S RIGHT TO DUE PROCESS WHEN, IN A PROBATION REVOCATION HEARING, IT DENIED PETITIONER THE OPPORTUNITY TO MAKE A MOTION TO SUPPRESS PHYSICAL EVIDENCE PRIOR TO THE HEARING.

A.

The Petitioner Deliberately Failed to Comply With the Applicable Illinois Procedure Governing Motions to Suppress Evidence.

The record clearly shows that Petitioner's attempt to get the trial court to entertain his motion to suppress evidence failed because it was not timely filed. In fact, no written motion was ever filed at all. The probation revocation hearing was held almost four months after the People's petition to revoke probation was filed. There is no question here of lack of notice; Petitioner had filed a motion to suppress on the substantive charges which were the basis of three of the revocation allegations.

As the Appellate Court of Illinois, Fourth District, pointed out in affirming the revocation of Petitioner's probation, the trial court's refusal to entertain the motion to suppress was correct under Illinois Criminal Law and Procedure. Ill. Rev. Stat. 1977, ch. 38, par. 114-12(b)(c) governing motions to suppress,. provides:

> (b) The motion shall be in writing and state facts showing wherein the search and seizure were unlawful.***.
>
> (c) The motion shall be made before trial unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion. If the motion is

made during trial, and the court determines that the motion is not timely * * *.

(See *People* v. *Matschke,* full opinion in Petitioner's Brief at Appendix A.)

B.

The Seizure of Controlled Substances From the Petitioner Was Not Illegal.

There was ample uncontradicted testimony at the hearing that showed the legality of the seizure of Petitioner's shaving kit and flight bag. The two items were removed from the car and taken to the sheriff's office at the Petitioner's request. He represented that the bags contained money which he would put up for bond. Obviously then the Petitioner expected to have access to the bags. He could not have access to the bags while in custody and still retain a reasonable expectation that their contents would remain free from police examination. This is sufficient to take the present case out of the purview of *United States* v. *Chadwick,* 433 U. S. 1, 97 S. Ct. 2476 (1977), and its line of cases.

Generally, whenever a defendant's suitcase or some similar container was properly impounded by the police at the time of his arrest, an item-by-item inventory of its contents at the station is permissible. *United States* v. *Lipscomb,* 435 F. 2d 795 (5th Cir. 1970).

United States v. *French,* 414 F. Supp. 798 (W. D. Okla. 1976), presents a very similar situation to that encountered by the arresting officer in the present case. There the officers arrested the defendant in his room and after allowing him to get dressed asked him if he had any valuables in the room he wanted to secure. Defendant then pointed to two items, a box and a bag under or near a dressing table. The officers immediately opened and searched the bag finding a large

amount of currency which defendant later moved to suppress. The court found that this was virtually a consent search and that even if it was not, "the officers had good reason and legal authority to determine the contents of the bag and box to determine the extent of security required on behalf of [defendant] to protect his property and further to determine if weapons or items which might assist the arrested person to escape were contained therein." *Id.* at 799-800. The court also suggested that a search of this type could be upheld under *Chimel* v. *California,* 395 U. S. 752, 89 S. Ct. 2034 (1969). At any rate the position of the arresting officer in the present case appears to be stronger than the one in *French* because here it was the Petitioner who asked that the shaving kit and flight bag be removed from his car and taken in custody.

C.

Petitioner's Status as a Probationer Did Not Affect the Actions of the Arresting Officer.

Since the seizure of the contents of Petitioner's bag was legal there was no reason for the court to permit defense counsel's inquiry as to whether Officer Doty knew Petitioner was on probation. But assuming *arguendo* that the seizure was illegal and the officer knew that Petitioner was on probation, Petitioner would still not have met his burden unless he showed that the officer conducted the illegal search because he knew the Petitioner was on probation and a motion to suppress illegally seized evidence would not be entertained. *United States* v. *Winsett,* 518 F. 2d 51, 54 at n.5 (9th Cir. 1975); *People* v. *Dowery,* 62 Ill. 2d 200, 340 N. E. 2d 529 (1975). Here the uncontradicted testimony of Officer Doty was that it was his practice to run a driver's license check after most traffic stops, and that only after the check showed Petitioner's license suspended did he effect the custodial arrest which resulted in the bag search.

III.

CONCLUSION

For the foregoing reasons the Respondent, People of the State of Illinois, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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